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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREDERICK W. FISHER JR.
Petitioner

versus

COMMONWEALTH OF PENNSYLVANIA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Pennsylvania Wiretapping and Electronic Surveillance Control Statute is unconstitutionally restrictive when it convicts and jails an elderly man who recorded electronically his own telephone conversations for business purposes in the mistaken belief that he was obeying both state and federal law.

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Opinions Below

The Judgement of the Supreme Court of Pennsylvania which affirmed without opinion,is set forth at App A. The Opinion of the Superior Court of Pennsylvania, which is unreported and which affirmed the conviction of The Court of Common Pleas, Forty-Third Judicial District is set forth at App B.

The opinion and Order of The Court of Common Pleas, Forty-Third Judicial District denying Petitioner's post-trial motions is set forth at App C.

Jurisdiction

The Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal on December 13, 1994. This Court has jurisdiction pursuant to Title 28 U.S.C. §1257(a).

Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides in part: that no person shall...be deprived of life liberty or property without due process of law.

The Fourteenth Amendment to the United States Constitution provides in part:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of

life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

Pennsylvania's Wiretapping and Electronic Surveillance Control Act is annotated at 18 Pa.C.S.A. §5701 et seq. the text of the statute is set forth at App. E.

Concise Statement Of The Case

The Petitioner, Frederick Fisher, operated a real estate office. In connection with that operation he had in place a recording device, purchased from Radio Shack, that permitted him to record his own business conversations. Given his age (Mr. Fisher is now on Social Security) and the technical nature of his telephonic transactions, he believed he had every lawful right to record his "notes" and then have the secretary transcribe them.

The "victims" testified against him authenticating the taped conversations seized by the Attorney General's Office. None of them acknowledged any adverse consequences or ill motive from the taping save for the fact that they did not know they were being recorded. Petitioner testified on his own behalf that he honestly believed he was following the law. Jury instructions to this effect were submitted

by the defense and rejected at trial as well as in post trial motions. These points were as follows:

> 21. If you find that the alleged wrongful act was done by the Appellant with an honest belief that what was done was his legal right then you must find him not guilty in this case. Comm. v Shafffer, 32 Pa. Super. 375 (1907).
>
> 22. Or, if you find that an honest mistake of law negatives the specific intent necessary for the crime charged then you must find him not guilty. Comm. v Shaffer, 32 Pa. Super. 375 (1907); Comm v Drass, 146 Pa. 55 (1892).

Defendant was convicted and sentenced to eleven and one half months to twenty three months and an aggregate fine of $120,000.00

On appeal the Pennsylvania Superior Court affirmed the trial court with the

exception of remanding the case for resentencing on the issue of the fine imposed.

Petitioner then filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court raising, inter alia, the charge to the jury addressing the requisite standard of culpability with regard to a violation of the Wiretapping and Electronic Surveillance Control Act. The Supreme Court denied the Petition without opinion.

Petitioner now raises this issue within the framework of a constitutional argument.

ARGUMENT

Petitioner relies on two broad principles to justify his position that he is not guilty of violating Pennsylvania's Wiretapping and Electronic Surveillance Control Act. His first argument encompasses the principles that his actions did not constitute wrong-doing. For guidance on this we look to the Federal law as enacted under the Electronic Communication Privacy Act of 1986, specifically 18 USC §2511(2)(d). The facts of Petitioner's case clearly fall within the parameters of this exception. He was one of two parties engaged in telephonic communication. He, as part of his business practice simply "took down" electronically notes essential for his business.

However, looking to the Pennsylvania counterpart reveals an extremely narrow application of this exception. See, 18 Pa.

C.S.A. 5704(2). In fact as it pertains to private citizens the Pennsylvania Statute requires all parties to the communication to give their consent. See, 18 Pa C.S.A. 5704(4). The Court in Commonwealth v. Harvey 348 Pa super 544, 502 A2d 679 (1985) did not see an improper imbalance by giving the police more latitude than the private citizen. This does however appear to set the underlying privacy protections on its head.

An elderly business man in real estate where numbers and figures are tossed out at the speed of light is forbidden by the state to electronically take notes. But, an individual at the direction of a law enforcement official can record a private conversation for possible criminal prosecution.

It is Petitioner's contention that not only is this imbalance unconstitutional but that exception at 18 Pa C.S.A. 5705(4) is

unconstitutionally narrow in light of the Federal statute. Petitioner realizes that the Commonwealth is certainly within its sovereign right to afford its citizens broader privacy protections than the Federal Government may recognize. It steps over the line when in pursuit of those protections it begins incarcerating otherwise innocent citizens carrying on their daily business activities.

If privacy is the ultimate goal of both statutes then flexibility should be incorporated to achieve that goal. Such flexibility would examine the intent and purpose of the communication, i.e. whether privacy was expected by the caller. The Federal Statute at 18 USC §2510(5)(a)(i) provides a business exemption. Watkin v. L.M. Berry & Co. 704 F2d 577 (11th Cir. 1983) recognizes that business communication as opposed to private or personal calls do not carry the same expectations of privacy.

Thus when one calls a business establishment such as the one operated by Petitioner and they relay information concerning a property address, direction to its location, perhaps lot and size designation, tax parcel identification numbers etc. they do not expect that such information is attendant with any notions of privacy. See also, Abel v Bonfanti, 625 F. Supp 263 (SDNY 1985); Briggs v American Air Filter Co. Inc., 630 F2d 414 (5th cir 1980). Section 2511(2)(d) also provides added protection for consenting parties that intercepted communication still may not be used for furthering criminal or tortious conduct. This is exactly the position in which Petitioner finds himself. None of the nine individuals who testified that their conversations were recorded indicted that criminal or tortious consequences flowed from either the conversations or the recordings. In other words no harms

resulted.

The crux of the issue then is that an overly restrictive state mandate has resulted in imprisonment for conduct that when measured against federal authority would in all likelihood not even result in prosecution. It is Petitioner's contention that the federal law on this issue preempts a more restrictive state law. U.S. v Van Horn, 579 F. Supp. 804 (D.C. Neb 1984); U.S. v Womenchil, 778 F2d 1311 (8th Cir 1985); U.S. v Millstone Enterprises, Inc., 684 F. Supp. 867 (W.D. Pa 1988) rev. on other grounds, 864 F2d 21 (3rd Cir 1988). Accordingly, this statute should be found unconstitutional, at least as applied to Petitioner.

Petitioner's second issue is closely related and involves the degree of culpability. The Pennsylvania statute provides that a person is guilty if he intentionally intercepts electronic

communication. This language in substance is identical with the Federal Statute, 18 USC §2511.

Petitioner at trial presented two points for charge:

> 21. If you find that the alleged wrongful act was done by the Appellant with an honest belief that what was done was his legal right then you must find him not guilty in this case. Comm. v Shaffer, 32 Pa. Super. 375 (1907).
>
> 22. Or, if you find that an honest mistake of law negatives the specific intent necessary for the crime charged then you must find him not guilty. Comm. v Shaffer, 32 Pa. Super. 375 (1907); Comm v Drass, 146 Pa 55 (1892).

The trial clearly established that Petitioner believed he was following the law in taping his phone conversations. As

mentioned above he was adhering to the law as passed by Congress. The Petitioner's actions were completely devoid of any criminal intent. Petitioner realizes that both the state and federal law were amended to reflect a change in the wording of the statutes. Specifically, the word "willfully" was substituted by the word "intentionally".

It is Petitioner's contention that this change is form and not substance. Be it willful or intentional the Commonwealth must show some element of criminality which it did not. Therefore, the trial court erred when it refused to charge the jury as indicated in the cited points for charge. See, Commonwealth v Saccol, 384 Pa. Super 161, 557 A2d. 1095 (1989); Citron v Citron, 722 F2d 14 (2d Cir. 1983), cert denied, 466 US 973 (1984); U.S. v Townsend, 987 F2d 927 (1993).

CONCLUSION

In conclusion Petitioner finds himself jailed under a statutory scheme contrary to a preemptive federal statute and as such is repunant to the United States Constitution. Accordingly, Petitioner requests this Honorable Court to grant his Petition.

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA	No. 133 M.D. Allocatur Docket, 1994
Respondent;	Petition for Allowance of Appeal from the Superior Court
vs.	
FREDERICK W. FISHER,	Petition to Examine, Photocopy and Photograph Evidence
Petitioner;	

ORDER

PER CURIAM:

AND NOW, this 13th day of December, 1994, the Petition for Allowance of Appeal is denied and the Petition to Examine, Photocopy and Photograph Evidence is denied.

Mr. Justice Frank J. Montemuro is sitting by designation.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA V. FREDERICK W. FISHER, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA Philadelphia Office No. 02232 Philadelphia, 1993

Appeal from the Judgment of Sentence of the Court of Common Pleas, Monroe County, Criminal division, at No. 385 Criminal of 1992.

BEFORE: KELLY, FORD ELLIOTT and BROSKY, JJ.

MEMORANDUM:

Frederick W. Fisher, Jr. appeals from the judgment of sentence of the trial court following his jury trial convictions of nine counts of the Wiretapping and Electronic Surveillance Control Act,1 18 Pa. C.S.§5701 et seq.1 At count one, appellant was sentenced to a term of imprisonment of eleven and one-half to twenty-three months; at counts two through nine, he was sentenced to a $15,000 fine for each count, for an

aggregate fine of $120,000.

Appellant's statement of questions on appeal is as follows:

1. Did the trial court commit reversible error by refusing to grant a mistrial, strike responses from the record, or take any other curative measures, where the Commonwealth had elicited and received responses from its witnesses, concerning multiple inculpatory statements allegedly made by appellant where the commonwealth had not complied with mandatory rules of discovery pursuant to Pa. R. Crim. P. 305 B (1) (b), having such information in its possession and not providing it to appellant upon proper request?

2. Did the trial court commit reversible error by improperly admitting the playing of purported excerpt copies of the seized tapes

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at trial without the Commonwealth laying an adequate foundation as to the chain of custody of said tape or copies, as well as the copying procedure itself, so that some reasonable inference of reliability that the evidence was the same as when seized could be drawn?

3. Did the trial court commit reversible error by denying appellant's request for a continuance?

4. Did the trial court commit reversible error by forcing voir dire of the jury on January 5, 1993, rather than doing so at the actual time of trial?

5. Was the search warrant leading to the search of appellant's office, which yielded the tape recordings and thereafter all of the evidence against appellant, overbroad to the extent that the suppression court committed reversible error by not

suppressing the tape recordings and all evidence emanating from their seizure?

6. Did the trial court commit reversible error by allowing the playing of tape recordings in that the prejudicial impact outweighed the probative value of the tape recordings?

7. Did the trial court commit reversible error by refusing to instruct the jury as to suggested points for charge, Numbers 21 and 22, of the appellant's requested points, where such points were proper law and were not otherwise presented to the jury in the court's instructions?

8. Did the trial court abuse its discretion by sentencing appellant to [eleven and one-half to twenty-three] months on Count One and a $15,000.00 fine on each of the remaining eight counts for an aggregate fine of $120,000.00?

Appellant's Brief at ix-x. We affirm in part and vacate in part the judgment of sentence of the trial court.

In July, 1987 the Office of the Pennsylvania Attorney General and the Pennsylvania State Police commenced an investigation of appellant and the investigation centered around alleged real estate fraud committed in Monroe and Pike Counties. Thomas Hines, who was a Special Agent for the Pennsylvania Attorney Generals Office, believed probable cause existed indicating that appellant committed theft by deception, conspiracy and failure to file personal tax returns. A twenty-one page affidavit of probable cause for a search warrant was prepared for a search of appellant's business operations. On May 15, 1991 a magistrate issued the search warrant and the search was executed that same day.

Included in the search was the Charles Hearsey Realty Office, located in Monroe County. Pennsylvania Attorney General;s Office Special Agent Drew Monaghan participated in the search; he was trained in the "legal and technical aspects of wiretapping and electronic surveillance." Twenty-eight audio cassette tapes were seized from appellant's business office; several of the tapes were inscribed with names and dates. Special Agent Monaghan recognized some of the names on the tape as persons who had lodged complaints, with the Attorney General's Office, against appellant. Monaghan believed that the tapes "constituted evidence of real estate fraud in violation of the Wiretapping and Electronic "Surveillance Control Act." Trial Court Opinion, 1/11/93, at p. 2. A second search warrant was obtained so that

the Special Agents could listen to the contents of the cassette tapes. Appellant filed a motion to suppress evidence regarding the twenty-eight audio cassette tapes; the motion was denied. A jury trial was held and appellant was convicted of the instant crimes. This appeal followed

Appellant first claims that the trial court erred in admitting the testimony of Special Agent Thomas Hines, appellant's former employee Nitya Bernstein and business acquaintance Robert LaBar, regarding alleged inculpatory statements made by appellant.

We affirm this issue based upon our independent review of the record and the June 1, 1993 trial court opinion, at pages 1-41, of the Honorable Peter J. O'Brien of the Court of Common Pleas of Monroe County.2

Appellant's second claim is that the twenty-eight audio cassette tapes were

admitted into evidence without proper authentication.

Special Agent Hines seized twenty-eight tapes from appellant's office. He listened to the contents of the tape. After investigation he was able to identify the various voices on the tape.s He then played the tapes for the individual (nine) taped. Hines made copies of excerpts of the original tapes and had transcripts of the tapes produced; the copied excerpts were from appellant's taped conversations with the nine individuals and Hines intended that these excerpts would be the only tapes introduced at trial. The copies were simply an exact reproduction of portions of the original tapes. Copies of the original tapes were made available to appellant. Prior to trial the Commonwealth also provided appellant with copies of the

excerpts that would be introduced at trial; these excerpts were of the fourteen conversations with the nine individuals who were taped by appellant. N.T., 1/5/93, at 37-38. The copies of the excerpts of the original tapes were played in front of the jury prior to the testimony of each of the individuals who had been taped by appellant. The individuals who had been taped all testified at trial that the voices on the tapes, which were played for the jury, were theirs' and appellant's; the individuals also testified at trial that the voices on the tapes, which were played for the jury, were theirs' and appellant's; the individuals also testified that the substance of the conversation (between each individual and appellant) on the tape precisely represented the conversation that occurred when the actual telephone

conversation depicted on the tape took place. Appellant indirectly admitted the authenticity of the tapes when he testified that the nine individuals testified truthfully regarding the recorded telephone conversations. Id. at 278-279.

The admission or exclusion of evidence is a matter specifically within the discretion of the trial court, and we will not reverse its decision absent an abuse of discretion. Commonwealth v. Meadows, 381 Pa. Super. 354, 553 A.2d 1006 (1989).The basic requisite for the admissibility of evidence in a criminal case is that it be competent and relevant. Commonwealth v. Davis, 381 Pa. super. 483, 554 A.2d 104 (1989). In defining relevance our Court has stated that evidence is admissible if, and only if, it logically or reasonably tends to prove or disprove a material fact in issue,

tends to make such a fact more or less probable, or affords the basis for or supports a reasonable inference of presumption regarding the existence of a material fact. Commonwealth v. Ingram, 404 Pa. Super. 560, 591 A.2d 734 (1991). In assessing the admissibility of evidence the trial court must also, in appropriate cases, weigh the inflammatory nature of the evidence against its essential evidentiary value. Commonwealth v. Meadows, supra.

"Tape recordings are admissible when they are properly identified as a reproduction of what has been said and the voices are properly identified." Commonwealth v. Taraschi, 327 Pa. Super. 179, ___, 475 A.2d 744, 753 (1984).

We affirm this issue based upon our independent review of the record and Judge O'Brien's opinion, at pages 4-6.

Appellant's third claim is that the trial court erred in denying his request for a two-month continuance; his fourth claim is that the trial court erred "by forcing voir dire of the jury on January 5, 1993, rather than doing so at the actual time of trial." Appellant's Brief at 15. Appellant's third attorney had seven days, to prepare for trial, between voir dire and the start of the trial. Appellant has failed to allege if or now he was prejudiced by the trial court's actions in both issues number three and four.

We affirm appellant's third and fourth issues based upon our independent review of the record, and, Judge O'Brien's opinion, at pages 6-7. We note that appellant has alleged no prejudice and we can detect none.

Appellant's fifth claim is that the

search warrant (with its twenty-one page affidavit of probable cause), which led to the search of appellant's office on May 15, 1991 and the seizure of the twenty-eight audio cassette tape, "was overbroad and all evidence should have been suppressed." Appellant's Brief at 16. Appellant also avers that, alternatively, the seizure of the tape was not justified under the "plain view" doctrine. A suppression hearing was held on December 22, 1992 and the trial court denied appellant's motion to suppress on January 4, 1993.

Our Court stated in Commonwealth v. Lidge, 399 Pa. Super. 360, 582 A.2d 383 (1990).

> In reviewing an order denying a motion to suppress evidence, this Court must determine whether the factual findings of the suppression court are supported by the record. In making this determination, we consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense, as, fairly read in

the context of the record as a whole, remains uncontradicted. If, when so viewed, the evidence supports the factual findings, we are bound by such findings and may only reverse if the legal conclusions draawn therefrom ar i error. [Citation omitted.]

Id. at 362-63, 582 A.2d at 384.

Our Court stated in Commonwealth v. Singleton, 412 Pa. super. 550, 603 A.2d 1072 (1992),

The courts in the Commonwealth employ a totality of the circumstances' test, a enunciated in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), for determining the existence of probable cause for the issuance of a search warrant.

...

The magistrate's determination that probable cause existed must be given deference. A magistrate is not required to find a prima facie showing of criminal activity but rather the probability of criminal activity. While the inquiry is restricted to the four corners of the affidavit, the affidavit is to be interpreted in a common-sense and realistic fashion. The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and

'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

On appeal, the duty of a reviewing court is to ensure that the magistrate had a 'substantial basis for concluding that probable cause existed.' A trial court's determination of probable cause is accorded the utmost deference on appeal. [Citations omitted.]

Id. at ___, 603 A.2d at 1072-1073.

Our Court stated in Commonwealth v. Bagley, 408 Pa. Super. 188, 596 A.2d 811 (1991),

It is a fundamental rule of law that a warrant must name or describe with particularity the property to be seized and the person or place to be searched. In addition, the search may not go beyond the scope of the warrant. The particularity requirement prohibits a warrant that is not particular enough and a warrant that is overbroad. These are two separate, though related, issues. A warrant unconstitutional for its lack of particularity authorizes a search in terms so ambiguous as to allow the executing officers to pick and choose among

an individual's possessions to find which items to seize. This will result in the general "rummaging" banned by the fourth amendment. A warrant unconstitutional for its overbreadth authorizes in clear or specific terms the seizure of an entire set of items, or documents, many of which will prove unrelated to the crime under investigation. The offices executing such a warrant will not rummage, but will "cart away all documents." An overbroad warrant is unconstitutional because it authorizes a general search and seizure.

[A] warrant must describe the items as specifically as is reasonably possible.

[The] warrant must specifically list the things to be seized.

[I]n any assessment of the validity of the description contained in a warrant, a court must initially determine for what items probable cause existed. The sufficiency of the description must then be measured against those items for which there was probable cause and the description in the warrant requires suppression. An unreasonable discrepancy reveals that the description was not as specific as wa reasonably possible. [Citations omitted.]

Id. at ___, 596 A.2d at 814-15.

We affirm appellant's fifth issue based upon our independent review of the record,

and, Judge O'Brien's opinion at page 7, and, the January 11, 1993 suppression court opinion, at pages 1 -9, of the Honorable Ronald E. Vican of the Court of Common Pleas of Monroe County. We add that when Pennsylvania Attorney General's Office Special Agent Thomas Hines discovered the cassette tapes in appellant's office several of the cassettes were affixed with names of individuals who had previously filed complaints and had been interviewed by representatives of the Pennsylvania Attorney General's Office regarding appellant's alleged real estate fraud committed in Monroe and Pike Counties. N.T., 12/22/92, at pp. 24-29. Other tapes bore the name of Commonwealth attorneys who had previously engaged in telephone conversations with appellant regarding the investigation into the alleged real estate fraud. Special

Agent Hines had also been aware that appellant had tape recorded incoming telephone calls to his business office. Id. at 29. Hines believed that it was probable that the tapes contained evidence relating to appellant's alleged real estate fraud; he thereupon seized the tapes. Hines did not listen to the tape until he had first obtained a second warrant, not challenged in this appeal, authorizing him to do so.

Appellant's sixth claim is that the trial court erred in allowing the tapes to be played for the jury. He avers that the probative value of the tapes was outweighed by their prejudicial impact since they contained "some foul language", they contained areas of conversation which were "racy in nature", and, they were not "necessary to establish the corpus delicti of the alleged crimes." Appellant's Brief

at 21. Appellant admits that the tape had probative value but avers that said evidence was cumulative to other evidence that had been introduced by the Commonwealth. Id.

The use of foul language in a telephone conversation that has been taped does not render that tape inadmissible because of possible prejudicial effect; if the tape is otherwise relevant then it may be admitted into evidence. Commonwealth v. Riffert, 379 Pa. Super. 1, 549 A.2d 566 (1988). Hence, the "racy and foul language" on appellant's taped conversations would not have rendered the tapes inadmissible.

Our Court stated in Commonwealth v. Meder, 416 Pa. Super. 273, 611 A.2d 213 (1992), "Corpus delicti means the body of the crime or the fact that a crime has been committed." Id. at ___, 611 A. 2d at 215. Our Court stated in Commonwealth v. Rieland,

324 Pa. super. 115, 471 A.2d 490 (1984),

> There are two elements to a corpus delicti: (1) that a loss or injury has occurred; (2) that the loss or injury occurred through a criminal agency. the identity of the party responsible for the act is not an element of the corpus delicti. The corpus delicti may be proved by circumstantial evidence, but that evidence must be sufficient to convince the jury beyond a reasonable doubt that the crime charged was committed by someone.

Id. at ___, 471 A.2d at 491-92. "To prove corpus delicti, the Commonwealth need not prove each element of the crime charged beyond a reasonable doubt. Rather, the Commonwealth merely must establish that a crime was committed." Commonwealth v. Meder, supra at ____, 611 A.2d at 217.

In the instant case the introduction of the tapes into evidence was necessary in order to prove that appellant intentionally intercepted the telephone conversations between himself and nine other individuals. 18 Pa. C.S.Ï5703 (1). Without showing the

existence of the tapes and the content of the tapes the Commonwealth could not have shown that the instant crime occurred. Hence, the trial court did not err in permitting the tapes to be played to the jury.

Appellant's seventh claim is that the trial court erred in failing to include appellant's points for charge Number 21 and 22 in its jury charge. The requested points for charge are as follows.

> 21. If you find that the alleged wrongful act was done by the appellant with an honest belief that what was done was his legal right, then you must find him not guilty in this case. Com. v. Shaffer, 32 Pa. Super. 375 (1907).
>
> 22. Or, if you find that an honest mistake of law negative the specific intent necessary for the crime charged, then you must find him not guilty. Com. v. Shaffer, 32 Pa. Super. 375 (1907), Com. v. Drass, 146 Pa. 55 (1892).

Appellant's Brief at 21-22.

Our Court stated in Commonwealth v. Tharp, 373 Pa. Super. 285, 541 A.2d 14 (1988),

> In determining whether the trial judge committed an abuse of discretion or an error of law, we consider the charge as a whole in light of the evidence presented. If an error is found to have been committed, we will reverse the trial court's decision not to grant a new trial only where such error has been clearly prejudicial to the appellant. Refusal of a requested point for charge is proper ;where it does not represent an applicable, accurate statement of the law. Even where a requested instruction is relevant, a trial court need not include it if the charge already covers the point. [Citations omitted.]

Id. at 288089, 541 A>2d at 16.

We affirm this issue based upon our independent review of the record and Judge O'Brien's trial court opinion, at pages 7-8.

Appellant's eighth and final claim is that the trial court erred in imposing $120,000 in fines since "there is no consideration of the protection of the

public, the seriousness of the offense, the rehabilitative needs of the appellant, nor of his ability to pay," Appellant's Brief at 24.

Sencencing is a matter within the sound discretion of the trial court and absent an abuse of discretion we will not disturb a sentence on appeal. Commonwealth v. Semuta, 386 Pa. Super. 254, 562 A.2d 894 (1989).

> [I]n imposing a sentence of total confinement, the sentencing court must consider the history, character and condition of the defendant and not only the nature and circumstances of the crime. 42 Pa. Cons. Stat. Ï9725; Commonwealth v. Arent, 352 Pa. Super. 520, 508, A.2d 596 (1986). Additionally, the court must follow "the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." 42 Pa. Cons. Stat. Ï9721 (b)

Commonwealth v. Ruffo, 360 Pa. Super. 180, 185-86, 520 A.2d 43, 46 (1987). The trial

court should also consult a pre-sentence report, if available, where, as in the instant case, incarceration for one year or more is a possibility. Id. Further, the trial court must state on the record its reasons for the imposition of the particular sentence. Commonwealth v. Fetzner, ___ Pa. Super. ___, 539 A.2d 890 (1988). If the trial court examines a pre-sentence report and is aware of the relevant factors to be considered in sentencing a particular defendant we will assume that it meaningfully weighed the various factors, and, we will not disturb the sentencing court's discretion to sentence that defendant as it did. Commonwealth v. Devers, 519 Pa. 88, 546 A.2d 12 (1988). A sentencing court may deviate from the sentencing guidelines only if it provides a contemporaneous written statement of its

reasons for doing so. Commonwealth v. Mills, 344 Pa. Super. 200, 496 A.2d 752 (1985). The adequacy of the trial court's reasons is subject to review on appeal. Id.

Pursuant to Commonwealth v. Tuladziecki, 513 Pa. 508, 522 A.2d 117 (1987), and, Pa. R.A.P. 2119(f), appellant has included a concise statement of reasons relied upon for appeal. The purpose of the inclusions of a "concise statement" is to enable an appellant to demonstrate that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. Commonwealth v. Tuladziecki, supra; 42 Pa. C.S.A. Ï9781(b). In determining whether there is a substantial question we must ascertain if the Sentencing Code as a whole has been compromised. Commonwealth v. Ousley, 392 Pa. Super. 549, 573 A.2d 599 (1990).

We note that appellant has demonstrated that his claim involves a substantial question as to the appropriateness of his sentence under the Sentencing Code; hence, we will address this claim.

Our review of the June 24, 1993 sentencing transcript reveals that the trial court was aware of the relevant factors to be considered in sentencing appellant. The trial court also consulted a pre-sentence report. Hence, we will assume that the trial court meaningfully weighed the various factors and we will not disturb the trial court's discretion to sentence as it did regarding appellant's term of imprisonment (at count one). Commonwealth v. Fetzner, supra; Commonwealth v. Devers, supra. We now turn to the $120,000 fine imposed upon appellant (at counts two through nine).

The trial court may sentence a

defendant to pay a fine in addition to another sentence, either involving total or partial confinement or probation. Commonwealth v. Fusco, 406 Pa. Super. 351, 594 A.2d 373 (1991); 42 Pa. C.S.Ï9726(b). the trial court may sentence a defendant to only pay a fine, when, having considered the nature and circumstance of the crime and the history and character of the defendant, it is of the opinion the fine alone suffices. 42 Pa. C.S.Ï9726(c). "In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose." 42 Pa. C.S.Ï9726(d).

In the instant case there was no discussion at the June 24, 1993 sentencing hearing regarding appellant's ability to pay the fine. Our review of the pre-sentence

report indicates that appellant is sixty-five years old, collects $430 per month in Social Security benefits, claims to own Fawn Lake Development (which consists of 50 to 60 home lots) and receives $1,000 per month in mortgages that he holds. He has no major debts and there is no mortgage on Fawn Lake Development. However, it is unclear how much the lots in Fawn Lake Development are worth, and, the lots are titled in the names of appellant's son and daughter. Appellant also operates two mortgage companies the Chase Mortgage Company and Charles Monroe Mortgage.

We are not disputing the right of the trial court to impose any fines upon appellant. However, we find that the trial court did not engage in a determination of whether appellant possessed the financial resources to pay the $120,00 fine, and, did

not determine the nature of the burden that payment of the fine would impose. 42 Pa. C.S. Ï9726(c) and (d). It does not appear of record that appellant is or will be able to pay the fine. Id. Hence, we must vacate the judgment of sentence relating to the $120,000 fine (imposed at counts two through nine) and remand to the trial court for resentencing at counts two through nine.3 We direct the trial court to determine on the record whether appellant has the ability to pay any fine that the trial court wishes to impose (this determination involves the amount of the fine and the method of payment of the fine).

Judgment of sentence affirmed in part, and, vacated in part (regarding the $120,000 fine imposed). Case remanded for resentencing consistent with this Memorandum. Jurisdiction relinquished.

NOTES

[1]Specifically, appellant was convicted of 18 Pa. C.S.§5703 (1) which states, "Except as otherwise provided in this chapter, a person is guilty of a felony of the third degree if he: (1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavaor to intercept, any wire, electronic or oral communication [.]"

[2]We add that Robert LaBar testified that appellant told him that he recorded a telephone conversation with a Commonwealth official. Appellant admitted at trial that he taped conversations with all of the nine individuals that he was charged with improperly taping. N.T., 1/5/93, at 278-79. Appellant testified that he taped those nine individuals and did not ask for permission to tape the telephone conversations, and,

did not advise the individuals that they were being taped. Id. at 279. Labar, one of the individuals taped, was a Commonwealth official. Thomas Bat, one of the other individuals taped by appellant, was also a Commonwealth official. Id. at 56. Hence, LaBar's testimony regarding appellant's admission that he taped a conversation with a Commonwealth official was merely cumulative of appellant's testimony and other evidence introduced at trial. Accordingly, appellant could not have suffered prejudice from the introduction of LaBar's testimony at trial.

[3]As discussed, supra, we are not disturbing appellant's term of imprisonment imposed at count one.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Monroe County be, and the same is hereby Affirmed in part, and, vacated in part (Regarding the $120,000 fine imposed). Case remanded for resentencing. Jurisdiction relinquished.

By The Court:

APPENDIX C

COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNYSLVANIA

COMMONWEALTH OF PENNSYLVANIA vs. FREDERICK W. FISHER, JR. Defendant	No. 385 Criminal of 1992 POST-VERDICT MOTIONS

OPINION

On January 13, 1993, Defendant, Frederick W. Fisher, Jr. was convicted by a jury of nine counts of wiretapping (18 Pa. C.S.A. 5703). Defendant filed timely Post-Verdict Motions in the nature of a Motion for a New Trial and a Motion for Arrest of Judgment. Following the submission of briefs and oral argument on May 3, 1993, Defendant's Post-Verdict Motions are now before this Court for disposition.

Defendant first alleges that the Court committed error when we permitted three of

Commonwealth's witnesses to testify concerning inculpatory statement made by Defendant. Defendant contends that such statement should have been excluded due to Commonwealth's failure to comply with the mandatory rules of pre-trial discovery set forth in Pennsylvania's Rules of criminal Procedure, which states in pertinent part as follows:

"B. Disclosure by the Commonwealth

(1) Mandatory: In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy

or photograph such items.

(a) ...

(b) any written confession or inculpatory statement or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made, which is in the possession or control of the attorney for the Commonwealth." Pa. R. Crim. P. 305 B(1)b (emphasis in the original).

The trial court has "very broad discretion" in choosing an appropriate remedy when a discovery violation occurs. Commonwealth v. Rosa, 415 Pa. Super. 298, 305, 609 A.2d 200, 203 (1992). In order for a defendant to establish grounds for relief due to tardy disclosure, the defendant must demonstrate prejudice. Commonwealth v.

Gordon, 364 Pa. Super 521, 530, 528 A.2d 631, 635 (1987) allocatur denied 517 Pa. 621, 538 A.2d 875 (1988). If the alleged error does not prejudice the defendant or if the prejudice is minimal or cumulative in that it is substantially similar to other untainted evidence, then the error is harmless. Commonwealth v. Foy, 531 Pa. 322, 327, 612 A.2d 1349, 1352 (1992).

In the case at bar, Special Agent Thomas Hines; former employee Nitya Bernstein; and business acquaintance Robert LaBar all testified for the Commonwealth concerning statements Defendant had made regarding recorded telephone conversations. Agent Hines testified at trial that "Mr. Fisher indicated that there was no law against taping in the Bahamas, and it was all right to tape here as long as it was related to your business." (N.T., pg. 27). This statement was almost identical to Agent

Hine's testimony at the Omnibus Hearing on December 22, 1992. At that hearing, Agent Hines stated that Mr. Fisher had indicated that"it was legal to tape in the Bahamas, and also legal to tape here....as long as it was related to your business." (N.T., Omnibus Hearing, plg. 30). Inasmuch as the complained of testimony at trial was the same as the testimony at the pre-trial proceeding, Defendant cannot claim that Commonwealth failed to disclose the inculpatory statement. Commonwealth v. Romeri, 314 Pa. Super. 279, 460 A.2d 1139 (1983), affirmed, 504 Pa. 124, 470 A.2d 498, cert. denied, 466 U.S. 942 (1984).

At trial, in the case at bar, Nitya Bernstein and Robert LaBarr also referred to statements made by Defendant. Nitya Bernstein testified that Defendant had told her that, "As long as the other person knows they're being taped, it's ok, it's legal."

(N.T., pg. 44). Robert LaBarr testified that Mr. Fisher had "made reference to having recorded a conversation with a state official." (N.T., pg. 140). While neither of these oral statement by Defendant were specifically disclosed to him prior to trial, we conclude that such testimony was cumulative of various statements made by Defendant on prior occasions and at trial. Therefore, we find no prejudice to the Defendant.

Defendant testified at trial to having purposefully recorded a conversation with an individual after having asked for permission to do so. (N.T., pg. 277). Moreover, Defendant did not deny that recordings were made of telephone conversations with the nine individuals presented at trial without their permission. (N.T., pg. 278, 279). Defendant did however deny that these recordings were done "intentionally". We

find that whatever inculpatory content may have been associated with the non-disclosed testimony of Commonwealth's two witnesses, it was no more harmful to Defendant than the conduct Defendant testified to at trial. Commonwealth v. Taylor, 340 Pa. Super. 87, 104, 489 A>2d 853, 862 (1985) (nondisclosed pre-arrest statement no more harmful than defendant's statement at trial). Accordingly, we find no prejudice to Defendant in permitting Commonwealth's witnesses to testify concerning Defendant's statements. Commonwealth v. Foy, supra.

Defendant next alleges that the Court committed error in permitting the jury to hear excerpts of the seized tapes. Defendant allege that the copies were not properly authenticated or in the alternative were unduly prejudicial. Defendant's authentication argument is rather curious given the fact that during cross-

examination, Defendant affirmatively accepted and did not dispute the identification testimony of Commonwealth's witnesses concerning the taped conversations. (N.T., pg. 278, 279). Our Courts have specifically stated that, "tape recordings are admissible in evidence when they are properly identified and are a true and correct reproduction of the statements made, and when the voices are properly identified." Commonwealth v. Starks, 304 Pa. Super. 527, 530, 531, 450 A.2d 1363, 1364, 1365 (1982) (quoting Commonwealth v. Bolish, 381 Pa. 500, 524, 113 A.2d 464, 477 (1955)). "Every possibility of tampering or identity need not be eliminated; it is sufficient that the evidence, direct or circumstantial, establish a reasonable inference that the identity and condition of the exhibits remained unimpaired until they were surrendered to the court." Commonwealth v. Pedano, 266 Pa. Super. 461,

467, 405 A>2d 525, 528 (1979).

In the case at bar, Agent Hine testified that he listened to the original tapes; and made relevant excerpts of the conversations. (N.T., pg. 30. Witnesses were presented and were uncontested in their identification of the voices recorded on the tapes. Moreover, copies of the original tapes were furnished in advance to Defendant's counsel who admitted that he had not listened to the tapes prior to hearing them at trial. (N.T., pg. 38). We conclude that Agent Hines' testimony concerning authenticity sufficiently established their admissibility at trial.

Defendant's alternative allegation of error concerns the prejudicial effect of the "foul language" and "racy conversation" contained in some of the tapes. Our Superior Court has held that the use of foul

language in conversations does not render otherwise relevant evidence inadmissible because of the possible prejudicial effect it might have on the jury. Commonwealth v. Riffert, 379 Pa. Super. 1, 19, 549 A>2d 566,576 (1988) allocator denied, 522 Pa. 602, 562 A. 2d 825 (1989). We find that the probative value in playing the telephonic tape recordings, outweighed any possible prejudicial effect caused by the language used.

Defendant further alleges that the Court committed error in denying Defendant's request for a continuance and in having Voir Dire one week prior to the commencement of the actual trial. "The matter of continuance is traditionally one within the discretion of the trial judge, and no prophylactic rule exists for determining when a denial of a continuance amounts to a violation of due process." Commonwealth v.

Atkins, 233 Pa. Super. 202, 207, 336, A.2d 368, 371 (1975). An accused's request for a continuance must be weighed against "the public need for the efficient and effective administration of justice." Commonwealth v. Kittrell, 285 Pa. Super. 464, 468, 427 A>2d 1380, 1381 (1981). In the case at bar, Defendant has had three different attorneys representing him since the filing of the criminal complaint instituting this action. Defendant was granted a two month continuance on September 1, 1992 and a seven-day continuance was granted on January 5, 1993 when Defendant obtained his third counselor. Furthermore, a seven-day delay between Voir Dire and the commencement of the trial does not give rise to a presumption of prejudice. Actual prejudice must be demonstrated. Commonwealth v. Shirey, 333 Pa. Super. 85, 109, 481 A>2d 1314, 1326, 1327 (1984), (six week lapse upon selecting jury not prejudicial).

Defendant has failed to show any prejudice particularly since the delay between Voir Dire and commencement of trial was granted at defense counsel's request.

Defendant's next allegation of error concerns the validity of the search warrant which led to the seizure of the telephonic tape recordings. This was the very same issue asserted by Defendant on December 22, 1992 at the Omnibus hearing held before a Judge of this Court. We adopt the reasoning set forth by the Honorable Ronald E. Vican in the Opinion and Order filed January 11, 1993 denying Defendant's Motion to Suppress the seized tapes.

Defendant's final contention of error pertains to the Court's refusal to grant two of Defendant's requested points for charge. The proposed instructions stated as follows:

"21. If you find that the alleged wrongful act was done by the defendant with an honest belief that what was done was his legal right, then you must find him not guilty in this case. Com. v. Shaffer, 32 Pa. Super. 375 (1907).

22. Or, if you find that an honest mistake of law negatives the specific intent necessary for the crime charged, then you must find him not guilty. Com. v. Shaffer, 32 Pa. Super. 375 (1907); Com. v. Drass, 146 Pa. 55 (1892)."

However, these theories were adequately and inaccurately covered by the following instruction given by the Court to the jury:

"Ignorance of the law or a mistaken belief that one's conduct is lawful is not a defense unless ignorance or mistake negate a required specific intent to violate the law." See, Kratz v. Kratz, 477 F. Supp. 463 (E.D. Pa. 1979) and Commonwealth v. Jackson, 146 Pa. Super. 328, 332, 22 A.2d

299, 301; affirmed 345 Pa. 456, 28 A.2d 894 (1942).

Therefore, we conclude the denial of the points for charge was not error. Commonwealth v. Tharp, 373 Pa. Super. 285, 289, 541 A.2d 14, 15 (1988).

O R D E R

AND NOW, this first day of June, 1993, it is ordered as follows:

1. Defendant's Post-Verdict Motions are denied.

2. Defendant Frederick W. Fisher, Jr. is directed to appear for sentencing before the Court on the 24th of June, 1993 at 9:00 a.m. in Courtroom No. 3, Monroe County Courthouse, Stroudsburg, Pennsylvania.

3. The Monroe County Probation Department is directed to conduct a

presentence investigation and furnish the Court with a Report.

BY THE COURT:

/S/Peter J. O'Brien J.

APPENDIX D

SIDE BAR:

THE COURT: Does the Commonwealth have any exception to the Charge of the Court, or request for additional instrcution?

MR. WIEDEMER: The Commonwealth is satisfied with the Court's instruction.

THE COURT: The defense?

MR. NEWMAN: Just for the record, what are the last two numbers? Twenty-one? Twenty-two?

Defenses only objection to the Charge is that Numbers 21 and 22 are a correct statement of law, and should have been read.

APPENDIX E

Section 5703 Interception, disclosure or use of wire, electronic or oral communications

Except as otherwise provided in this chapter, a person is quilty of a felony of the third degree if he:

(1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication;

(2) intentonally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication or evidenced derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication; or

(3) intentonally uses or endeavors to use the contents of any wire, electronic or

oral communication or evidenced derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

Section 5704 Exceptions to prohibition of interception and disclosure of communications

It shall not be unlawful under this chapter for:

(2) Any investigative or law enforcement officer, or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire,

(i) Such officer or person is a party to the communication; or

(ii) One of the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a Deputy Attorney General designated in writing by the

Attorney General, or the District Attorney, Or an Assistant District Attorney designated in writing by the District Attorney, of the County wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; However such interception shall be subject to the recording and record keeping requirements of Section 5714(a) (relating to recording of intercepted communications) and that the Attorney General, Deputy Attorney General, District Attorney or Assistant District Attorney authorizing the interception shall be the custodian of recorded evidence obtained therefrom.

(4) A person, to intercept a wire, electronic or oral communication, where all parties to the communication have given prior consent to such interception.

(2)

Supreme Court, U.S.
FILED
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No. 94-1520

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREDERICK W. FISHER, JR.,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

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17 pp

QUESTION PRESENTED

Whether a State legislature may prohibit intentional recording of a private individual's own telephone calls without the consent of all parties to the conversation?

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No. 94-1520

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREDERICK W. FISHER, JR.,

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v.

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Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION BY RESPONDENT, COMMONWEALTH OF PENNSYLVANIA

Respondent, Commonwealth of Pennsylvania, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Superior Court of Pennsylvania. That decision is not reported. It is set forth as Appendix B to the petition.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) which permits review by writ of certiorari of judgments of the highest state court in which "a decision could be had." Appeals as of right in noncapital cases in Pennsylvania are heard by the Superior Court, an intermediate appellate court. *See* 42 Pa. Cons. Stat. Ann. § 742 (Purdon 1981). Further review is by allowance of appeal to the Pennsylvania Supreme Court. *See* 42 Pa. Cons. Stat. Ann. § 724 (Purdon 1981). Where, as here, the highest state court declines to exercise its authority, the judgment of the intermediate court is the judgment reviewable under 28 U.S.C. § 1257 (a). *See Sullivan v. Texas*, 207 U.S. 416 (1908) and *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968). For this reason, the petition for certiorari should have been sought to the Superior Court, not to the Pennsylvania Supreme Court.

Significantly, this Court is without jurisdiction to grant "review" where petitioner did not present his constitutional theory to the "highest court" in the State to rule on the merits. Allegations that the Pennsylvania Wiretapping and Electronic Surveillance Control Act violates the federal constitution were not presented to or ruled upon by the Pennsylvania courts. This Court will not consider federal issues not presented and ruled upon below. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The rationale for this rule is based on principles of federalism as well as judicial economy.

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257,

> there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them.

Cardinale v. Louisiana, 394 U.S. 437, 439 (1969). Similarly, this Court will not address a constitutional issue presented on a new legal theory. *Webb v. Webb*, 451 U.S. 493, 496-98 (1981) and *Picard v. Conner*, 404 U.S. 270, 278 (1971).

In the Pennsylvania courts, petitioner never raised the issue he now presents. He argued that ignorance of the law was a defense, not that the statute prohibiting wiretapping was unconstitutional. Petitioner acknowledges that he has not previously presented the constitutional challenge when he states: "Petitioner now presents this issue within the framework of a constitutional argument." Pet. at p. 6 (emphasis supplied).

Moreover, failure to raise the issue in the trial court would present a procedural bar to review in Pennsylvania. *See* Pa.R.A.P. 302 ("Issues not raised in the lower court are

waived and cannot be raised for the first time on appeal"); and *Commonwealth v. Hawkins*, 295 Pa. Super. 429, 441 A.2d 1308 (1982) (even issues of constitutional dimension cannot be raised for the first time on appeal).

This Court lacks jurisdictional to "review" the constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act where no challenge to the constitutionality of the Act was presented or ruled upon below.

STATEMENT OF THE CASE

Petitioner, Frederick W. Fisher, Jr. ("Fisher"), asks this Court to grant review and to declare unconstitutional the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. Ann. §§ 5701, *et seq.* (Purdon 1994, supp.) (hereinafter "Act"), which he has been convicted of violating. The respondent is the Commonwealth of Pennsylvania.

Pursuant to a warrant, the Office of Attorney General of Pennsylvania searched Fisher's real estate office in conjunction with an investigation into allegations of real estate fraud generally, and theft by deception specifically. A number of audio cassette tapes were seized during the search. These tapes formed the basis of charges brought against Fisher for violating the Act by tape-recording conversations he had with others without their consent to the recordation in violation of 18 Pa.Cons. Stat. Ann. § 5703. (The text of section 5703 is set forth at Pet. App. E.)

The evidence at trial revealed that Fisher had recorded his telephone calls with nine individuals without the knowledge or consent of the individuals. Although Fisher told an investigator "that there was no law against taping in the Bahamas, and it was all right to tape here as long as it was related to your business," at trial he claimed that he did not intentionally record the conversations. (R.R. 254-55)[1] Other evidence established that Fisher was actually aware of the prohibition against tape recording conversations without consent. He told an employee that "as long as the other

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[1]Reference is to the Reproduced Record filed in the Superior Court of Pennsylvania.

person knows they're being taped, it's okay, it's legal." (R.R. 44) In fact, on one tape-recording heard by the jury, Fisher asked permission of the other party to record their conversation. (R.R. 34) Fisher testified that he had been told that tape-recording was not allowed. (R.R. 285-286)

Fisher requested that the trial judge instruct the jury that ignorance of the law was a complete defense. (Pet. C-13) The trial court declined to give the proposed instructions and gave an instruction that ignorance of the law was not a defense unless it negated a required specific intent to violate the law. (*Id.*) Fisher did not challenge the constitutionality of the Act.

The jury convicted Fisher of nine counts of illegal interception in violation of 18 Pa. Cons. Stat. Ann. § 5703. Post-trial motions were denied. He was sentenced to 11½ to 23 months imprisonment and fined $120,000.

On appeal, Fisher raised eight issues. (Pet. B-2--B-5) He renewed his challenge to the jury instructions. He did not present a constitutional challenge to the Act. The Superior Court of Pennsylvania affirmed the convictions, but reversed the fine. (Pet. Appendix B) The Pennsylvania Supreme Court denied allowance of appeal. (Pet. Appendix A)

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Court Should Deny Review Because Petitioner Never Presented the Federal Issue to the Pennsylvania Courts.

As noted in the statement of jurisdiction and the statement of the case, the question presented by petitioner was never presented below. Petitioner never argued that the Pennsylvania Act unconstitutionally conflicted with the less restrictive federal statute. Petitioner never argued that the Pennsylvania Act's criminalization of an "intentional" interception of a wire communication was unconstitutional. Pursuant to *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969), this Court should deny.

2. Congress Did Not Preempt More Protective State Wiretapping Act Requirements.

Pennsylvania's Wiretapping and Electronic Surveillance Control Act is patterned after Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (Lawyers Co-op. 1979). The federal provisions were amended by the Electronic Communications Privacy Act of 1986. Pennsylvania enacted conforming amendments on October 21, 1988, P.L. 1000, No. 115. The federal statute allows a private party to a communication to intercept it. 18 U.S.C. § 2511(2)(d). The Pennsylvania Act only allows such interception where all parties to the communication give prior consent to the interception. 18 Pa. Cons. Stat. Ann. § 5704(4). Pennsylvania's adoption of a more restrictive statute does not violate the Supremacy Clause. U.S. Const. art. VI, cl. 2.

The federal wiretap statute reflects three congressional goals: to establish a standard of admissibility of wiretap evidence for federal court proceedings; to set a nationwide minimum standard for infringement upon citizens' privacy; and to allow states to create state statutory criteria which are more protective of citizens' privacy than the federal minimum standard. *See* 18 U.S.C. § 2516 (2); Senate Report No. 1097, 90th Cong., 2d Sess, 1968 U.S. Code Cong. & Ad. News 2180, 2187; *People v. Conklin*, 12 Cal. 3d 259, 266-73, 522 P.2d 1049, 1053-58, 114 Cal. Rptr. 241, 245-50 (1974), *appeal dismissed*, 419 U.S. 1064 (1974); and *Commonwealth v. Vitello*, 367 Mass. 224, 245-47, 327 N.E.2d 819, 832-34 (1975). The cases relied upon by petitioner do not stand for the proposition that states are preempted from protecting privacy to a greater extent than Congress.

Since Congress did not intend to preempt more protective state requirements (and, indeed, specifically intended to permit such laws), and since none of the provisions in the federal law conflicts with the application of more protective requirements in state criminal proceedings, the federal wiretap statute does not preempt the more rigorous Pennsylvania Act.

3. Petitioner Knew That Consent Was Required to Tape the Telephone Conversations. The Record Does Not Present the Issue He Raises.

The facts in this case prove beyond a reasonable doubt that Fisher actually knew that he could only tape-record a conversation with the consent of the other party. One tape-recording on which he sought consent to record (R.R. 34) and Fisher's own testimony (R.R. 285-286) are evidence of Fisher's knowledge that he needed mutual

consent before taping a conversation. He informed an employee that it was legal to tape with consent. (R.R. 44)

The facts of this case do not present a defendant who is ignorant of the law. The question which petitioner presents is premised upon a factual predicate which was not shown here.

4. The Requirement That a Defendant "Intentionally" Intercept in Order to Be Convicted of Violating the Act is Constitutional.

As noted above, petitioner never challenged the constitutionality of the Pennsylvania Act. In any event, the challenge presented is not worthy of review. A violation of 18 Pa. Cons. Stat. Ann. § 5703(1) is established when the Commonwealth proves that the defendant "intentionally intercept[ed] . . . any wire . . . communication." Fisher requested and was granted the following point for charge: "A person acts intentionally with respect to a material element of an offense when, if the element involves the nature of his conduct or result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result." (R.R. 301) Nowhere in his petition does Fisher explain how this instruction under the Pennsylvania Act violated the federal Constitution.

Fisher seems to suggest that Congressional amendments to Title III changing the *mens rea* requirement from "willful" to "intentional" (and conforming Pennsylvania amendments) were meaningless. The use of "willful" in Title III led to confusion and uncertainty. *Malouche v. J.H. Mgmt. Co.*, 839 F.2d 1024 (4th Cir. 1988). *Compare Citron v. Citron*, 722 F.2d 14, 16 (2d Cir. 1983) (requiring proof

of specific intent, intentional violation of known legal duty) *cert. denied*, 466 U.S. 973 (1984), with *United States v. Ross*, 713 F.2d 389, 391 (8th Cir. 1983). To remedy this situation Congress amended section 2511(1) in 1986 to substitute the term "intentional" in place of willful. Pennsylvania adopted the same change in 1988. Fisher cites no authority for his proposition that notwithstanding the amendment, to be constitutional, criminal wiretapping requires proof of a specific intent and that an honest mistake of law must be recognized as a defense.

No federal or state court has ever invalidated the Congressional determination that a criminal wiretapping violation could be proven by showing "intentional" conduct rather than a specific intent of "willfulness." At least one Court has upheld a conviction under the amended culpability provisions. *United States v. Townsend*, 987 F.2d 927 (2d Cir. 1993). Moreover, this is a question of statutory construction without an immediate constitutional dimension. Only if the federal statute were construed one way and then the Pennsylvania construction differed would the issue arise as to whether the Pennsylvania Act conformed to Title III, as amended. This Court should not entertain an issue not heretofore addressed in any reported decisions.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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